

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CASEY CUNNINGHAM, ET AL.,

Plaintiffs,

v.

CORNELL UNIVERSITY, ET AL.,

Defendants.

No. 1:16-cv-6525-PKC

**PLAINTIFFS' SECOND NOTICE OF SUPPLEMENTAL AUTHORITY
FURTHER SUPPORTING DENIAL OF MOTIONS TO DISMISS [DOCS. 71, 75]**

Plaintiffs' oppositions to the pending motions to dismiss discuss the opinions of the Supreme Court and en banc Ninth Circuit in *Tibble v. Edison International*, regarding an ERISA fiduciary's duties to monitor defined contribution plan investments and to eliminate retail-class mutual fund shares when identically managed, lower-cost institutional-class shares are available. *See, e.g.*, Doc. 87, at 11, 23–25¹ (citing *Tibble v. Edison Int'l*, 135 S.Ct. 1823, 1828–29 (2015), and *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197–98 (9th Cir. 2016) (en banc)); Doc. 91 at 23–26.

Following a bench trial on remand, the *Tibble* district court has now entered its Findings of Fact and Conclusions of Law. *Tibble v. Edison Int'l*, No. 07-5359, Doc. 567 (C.D. Cal. Aug. 16, 2017) (attached). The court concluded that the fiduciaries of the Edison plan breached their duty of prudence by using retail-class shares of 17 mutual funds instead of institutional-class shares of the same funds. *Id.* at 17–18. The court found that a prudent fiduciary would have known “of the existence of the institutional shares” and would have switched to the institutional shares as soon as they became available. *Id.* at 19–20.

¹ “Doc.” page citations refer to the page numbers shown on the ECF header.

Tibble further supports Plaintiffs' argument here that Defendants' use of 92 retail-class mutual funds as Plan investment options instead of lower-cost institutional-class shares of the same funds raises a plausible inference that Cornell and CAPTRUST breached their fiduciary duties. Doc. 87 at 15, 23–27; Doc. 91 at 23–26. Plaintiffs submit the *Tibble* decision for the Court's consideration.

August 18, 2017

Respectfully submitted,

/s/ Jerome J. Schlichter
SCHLICHTER, BOGARD & DENTON LLP
Andrew D. Schlichter, Bar No. 4403267
Jerome J. Schlichter*
Michael A. Wolff*
Troy A. Doles*
Heather Lea*
100 South Fourth Street, Suite 1200
St. Louis, Missouri 63102
Phone: (314) 621-6115.
Fax: (314) 621-5934
aschlichter@uselaws.com
jschlichter@uselaws.com
mwolff@uselaws.com
tdoles@uselaws.com
hlea@uselaws.com

*Admitted *Pro Hac Vice*

Attorneys for Plaintiffs